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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 530

TSEUNG CHU, also known as BOW QUONG CHEW, also known as TSEUNG BOWQUONG CHEW, also known as THOMAS BOWQUONG CHEW,

Petitioner,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, at Los Angeles, California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, at Los Angeles, California,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The United States District Court for the Southern District of California rendered no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported; a copy thereof is appended to this petition in the Appendix at pages 3-24. A copy of the concurring opinion of Circuit Judge Chambers is appended to this petition in the Appendix at pages 25-26.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on July 11, 1957 [R. p. 85] and a copy thereof is appended to this petition in the Appendix at page 52. There were no proceedings respecting rehearing. The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254(1).

Questions Presented.

Petitioner sought a judicial declaration in the District Court that an order of deportation issued by the United States Department of Justice, Immigration and Naturalization Service, is invalid. The order of deportation rested on two grounds: (1) that prior to entry into the United States petitioner had been convicted of a crime involving moral turpitude, to wit, the crime of wilfully attempting to defeat or evade the income tax; (2) that he had procured a visa for such entry by fraud or by wilfully misrepresenting a material fact of such conviction in his application for visa. [R. p. 69.]

The District Court denied relief to petitioner. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. The questions presented are:

1. Whether the conviction of petitioner of a violation of Title 26 U. S. C. Section 145(b), Internal Revenue Code of 1939, on March 27, 1944, upon petitioner's plea of *nolo contendere*, and prior to the last entry of petitioner into the United States on August 11, 1953 constitutes a conviction of a crime involving moral turpitude where the indictment upon which

petitioner was convicted alleged that petitioner committed such attempt to evade income tax by making under oath false and fraudulent income tax returns;

2. Whether the failure of petitioner in his application for a visa upon the occasion of his last said entry into the United States to disclose the fact of his said conviction constitutes the procurement of a visa by fraud or by wilfully misrepresenting a material fact within the meaning of Section 212(a)(19) of the Immigration and Naturalization Act of 1952.

3. Whether the phrase "involving moral turpitude", as referred to in Section 212(a)(9) of the Immigration and Nationality Act of 1952 has a sufficiently definite meaning to afford a constitutional standard for deportation when applied to petitioner's conviction for violation of Title 26 U. S. C. Section 145(b) (Revenue Code of 1939).

Statutes Involved.

The pertinent portions of Section 10 of the Administrative Procedure Act, 60 Stat. 243, Title 5 U. S. C. Section 1009; 53 Stat. 62, Internal Revenue Code of 1939, Title 26 U. S. C. Section 145(b); Section 1114(b) of the Revenue Act of 1926, 44 Stat. at L. 116, chap. 27. U. S. C. Supp. V, Title 26, Section 1266; 66 Stat. 182, Section 212(a)(9) of the Immigration and Naturalization Act of 1952, Title 8 U. S. C. Section 1182(a)(9); 66 Stat. 182, Section 212(a)(19) of the Immigration and Naturalization Act of 1952, Title 8 U. S. C. Section 1182(a)(19); and 66 Stat. 204, Section 241(a)(1) of the Immigration and Naturalization Act of 1952, Title 8 U. S. C. Section 1251(a)(1), are set forth in the Appendix at pages 1-2.

Statement of Facts.

This suit was brought in the District Court on November 4, 1955 [R. p. 27] under the provisions of Section 10 of the Administrative Procedure Act, 60 Stat. 243, Title 5 U. S. C. Section 1009, for a judicial declaration that the order of deportation issued by the United States Department of Justice, Immigration and Naturalization Service, against petitioner is invalid. [R. p. 68.] The order of deportation issued against petitioner rested on two grounds:

> (1) that prior to his last entry into the United States he had been convicted of a crime involving moral turpitude; to wit, the crime of wilfully attempting to defeat or evade the income tax (Internal Revenue Code of 1939, Title 26, U. S. C. Sec. 145(b));
>
> (2) that he had procured an immigration visa for such entry by fraud or by wilfully misrepresenting a material fact. [R. p. 69.]

The facts upon which the order of deportation was based are:

Petitioner first entered the United States at San Francisco, California, on November 9, 1907 as the son of a merchant. He departed from the United States on June 15, 1912 and was readmitted on October 22, 1913 as a treaty merchant. He left this country in 1947 and on August 11, 1953 last entered the United States at Honolulu, T. H. as a returning resident alien. On March 27, 1944 petitioner had been convicted at Los Angeles, California on his plea of *nolo contendere* of violating Title 26 U. S. C. Section 145(b) (Revenue Code of 1939), to wit, of wilfully attempting to evade and defeat the payment of income tax.

In his application for a visa upon the occasion of his last entry petitioner failed to disclose the fact of such conviction.

Question No. 32 on the application for visa reads as follows:

> "I have never been arrested; convicted; in prison; in an almshouse; treated in an institution, hospital, or other place, for insanity or other mental disease; the beneficiary of a pardon or amnesty, except as hereinafter stated.",

to which petitioner gave the sworn answer: "None". [R. p. 70.]

Petitioner's conviction hereinbefore referred to was based upon a four-count indictment. The indictment for each of the calendar years of 1937, 1938, 1939 and 1940, each year being covered in a separate count, charged that petitioner, with respect to income tax: ". . . wilfully, knowingly, unlawfully and feloniously" attempted to evade and defeat his tax by making ". . . under his oath . . . a false and fraudulent income tax return for said calendar year . . ." [R. pp. 70-71.] His sentence consisted of a fine. [R. p. 71.]

Petitioner took an administrative appeal from the decision of the Special Inquiry Officer of the Immigration and Naturalization Service ordering such deportation, and thereafter such appeal was dismissed by the Board of Immigration Appeals. The opinion of the Special Inquiry Officer dated December 7, 1954 is set forth in the Appendix at pages 38-43; the said opinion of the Special Inquiry Officer refers to a previous order of such Special Inquiry Officer dated May 25, 1954. After the making of the order of May 25, 1954 the Special Inquiry Officer ordered the deportation proceedings re-

opened. The opinion of the Special Inquiry Officer dated May 25, 1954 is set forth in the Appendix at pages 27-37. (The opinion of May 25, 1954 is appended because of the reference thereto in the opinion of December 7, 1954.) The opinion of the Board of Immigration Appeals is set forth in the Appendix at pages 44-51. Thereafter a warrant of deportation issued for the deportation of petitioner. [R. p. 69.] The District Court on June 11, 1956 gave judgment against petitioner [R. p. 52]; and the Court of Appeals for the Ninth Circuit on July 11, 1957 affirmed the judgment of the District Court. [R. p. 85.]

The District Court below had jurisdiction of the case under the provisions of Section 10 of the Administrative Procedure Act, 60 Stat. 243, Title 5 U. S. C. Section 1009. [R. p. 68.]

The Court of Appeals concluded that a conviction under Title 26 U. S. C. Section 145(b), Revenue Act of 1939, where the intent to defraud the Government is charged in the indictment, is a conviction of a crime involving moral turpitude. [R. pp. 78-79.]

The Court of Appeals further concluded that the conviction under Section 145(b) having been concluded to be a conviction involving moral turpitude, petitioner was under a duty to dsclose such conviction as a material fact in his application for an immigration visa, "for a conviction of a crime involving moral turpitude is without question a material fact." [R. p. 79.] The Court of Appeals further concluded that petitioner's conviction by a plea of *nolo contendere* likewise must be admitted in an application for an immigration visa where, as the Court of Appeals concluded, the conviction was of a crime involving moral turpitude. [R. p. 80.]

The Court of Appeals further concluded that the phrase "crime involving moral turpitude" when applied to petitioner's conviction of wilful attempt to defeat and evade income tax has a sufficiently definite meaning to afford a constitutional standard for deportation. [R. pp. 82-84.]

Reasons for Granting the Writ.

The decision of the Court below should be reviewed for the following reasons:

1. The decision of the Court below has decided Federal questions of law in a way that is in conflict with applicable decisions of this Court. In ruling that an intent to defraud the Government is a prerequisite to conviction under Section 145(b) of Title 26 U. S. C. Revenue Code of 1939 [R. p. 78], the Court of Appeals below has decided a question of Federal law in conflict with the decision of this Court in *United States v. Schar-ton* (1931), 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, wherein this Court held that an intent to defraud is not an essential element of the crime of wilful attempt to defeat or evade the income tax and that under an indictment charging wilful attempt to defeat and evade income tax by making and filing false income tax returns with the intent to defraud the United States it is sufficient to prove a wilful attempt to evade or defeat the income tax.

Furthermore, the Court below in holding [R. pp. 78-79] that the averments in the indictment [R. pp. 70-71] to which petitioner pleaded *nolo contendere*, to wit, that petitioner "wilfully . . . attempted to evade and defeat his tax by making . . . under oath . . . a false and fraudulent income tax return . . ." were not "unnecessary" and that such allegations just mentioned were a part of the essential charge of the indict-

ment against petitioner, is in conflict with the decision of ths Court in the case of *United States v. Scharton, supra*, at page 51 of the official opinion wherein this Court ruled that such averments under the predecessor statute of 145(b), which predecessor statute defines the same crime as does 145(b), would be surplusage. This Court in the *Scharton* case considered Section 1114(b) of the Revenue Act of 1926, 44 Stat. at L. 116, chap. 27; and at the cited page stated:

> "There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Section 1114(b) such an averment would be surplusage, for it would be sufficient to plead and prove a wilful attempt to evade or defeat. Compare United States v. Noveck, 271 U. S. 201, 203, 70 L. ed. 904, 905, 46 S. Ct. 476."

The decision of the Court of Appeals below is also in conflict with the holding of this Court in *United States v. Noveck* (1925), 271 U. S. 201, 203, 46 S. Ct. 476, 70 L. Ed. 904, that where an indictment contains an allegation of a purpose to defraud the United States, such allegation does not affect the charge where the alleged purpose to defraud the United States is not an element of the statutory crime involved; and in conflict with the rule set forth by this Court, in *United States v. Noveck, supra*, at page 204 of the official opinion, to the effect that a statute will not be read to create crimes or new degrees or classes of crimes unless the purpose so to do is plain. The Court of Appeals below [R. p. 78] has taken the position that the language in the indictment to which petitioner pleaded *nolo contendere* which alleged the making of false and fraudulent income tax re-

turns is an essential part of the crime charged; and in effect held that the crime of wilful attempt to defeat or evade income tax can, by the addition of such allegations in an indictment, become a crime of wilful attempt to defeat or evade income tax by making false and fraudulent income tax returns. This position is in conflict with the decision of this Court in *Spies v. United States*, 317 U. S. 492, 499, 63 S. Ct. 364, 87 L. Ed. 418 (1942), wherein this Court stated that the crime of wilful attempt to defeat and evade income tax "may be accomplished in any manner" and that affirmative wilful attempt may be inferred from any conduct the likely effect of which would be to mislead or conceal, when coupled with a failure to file a return.

The Court of Appeals below has stated [R. p. 78] that it follows the rule laid down in the case of *Jordan v. De George* (1951), 341 U. S. 223, 71 S. Ct. 703, 95 L. Ed. 886. This Court in the latter cited case, at pages 226 and 227 of the official opinion, stated that the inquiry therein "is narrowed to determining whether this particular offense (conspiracy to defraud the United States of taxes on distilled spirits) involves moral turpitude." (Matter in parentheses added.) The statute involved in the *Jordan v. De George* case expressly made intent to defraud an element of the offense and thus came within those classes of statutes referred to in the above quoted portion of the opinion in *United States v. Scharton*, *supra*, of which statutes this Court stated that an indictment thereunder failing to aver such element of intent to defraud would be defective.

2. The decision of the Court below has decided important questions of federal law which have not been settled by this Court.

(a) The Court of Appeals below ruled that the crime of wilful attempt to defeat or evade income tax is a crime involving moral turpitude. [R. pp. 78-79]. This is an important question because if the decision of the Court below stands all aliens who have been convicted prior to last entry of this crime would be subject to deportation; and it likewise affects all aliens who may be convicted of such crime and another crime involving moral turpitude while in the United States, and be imprisoned for each conviction for one year or more, as such latter class of aliens would also be subject to deportation if this decision stands. This Court has not decided this question. The Court below stated that it was following the rule laid down in the case of *Jordan v. De George, supra.* In the *Jordan v. De George* case, *supra*, at page 232 of the official opinion, this Court stated, however, that "fraud is the touchstone by which this case should be judged." It has been stated that fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude. *United States ex rel. Berland v. Reimer* (C. C. A. 2, N. Y.), 113 F. 2d 429 (1940); and that the crime of wilful attempt to defeat or evade income tax is not a crime involving moral turpitude. *United States v. Carrollo* (D. C. Mo.), 30 Fed. Supp. 3, 7 (1939).

Congress in defining the crime of wilful attempt to defeat or evade income tax has declared that it can be committed "in any manner", and this Court, in its decision in *Spies v. United States, supra*, has so construed the statute. Such construction makes clear that income tax evasion does not necessarily involve moral turpitude.

A crime involving moral turpitude has been defined by the Court of Appeals for the Fifth Circuit as follows:

> "The words 'involving moral turpitude,' as long used in the law with reference to crimes, refer to

conduct which is inherently base, vile, or depraved, contrary to accepted rules of morality, whether it is or is not punishable as a crime. They do not refer to conduct which, before it was made punishable as a crime, was not generally regarded as morally wrong or corrupt, as offensive to the moral sense as ordinarily developed."

Coykendall v. Skrmetta (C. C. A. 5, 1927), 22 F. 2d 927.

(b) The decision of the Court below has decided a second question of federal law not settled by this Court in holding that the phrase "crime involving moral turpitude" when applied to petitioner's conviction of wilful attempt to defeat and evade income tax constitutes a constitutional standard. Petitioner contends that the phrase "crime involving moral turpitude", as used in Section 212(a)(9) of the Immigration and Nationality Act of 1952, lacks sufficiently definite standards when applied to the conviction of petitioner of wilful attempt to defeat or evade income tax to be constitutional in its application. While this Court ruled in *Jordan v. De George, supra*, that the statute which made conviction of two crimes involving moral turpitude a basis for deportation was not void for vagueness, this Court in the case of *Williams v. United States*, 341 U. S. 97, 95 L. Ed. 774, 71 S. Ct. 576 (1950), at page 101 of the official opinion, stated: "Many statutes might be extended to circumstances so extreme as to make their application unconstitutional." And this Court in *Jordan v. De George, supra*, considered it proper to test the statute embracing the phrase "crime involving moral turpitude" under the established criteria of "void for vagueness" doctrine, and at page 232 of the official opinion left open the question as to what the phrase "crime involving moral turpitude" may mean in peripheral cases.

(c) The decision of the Court below has decided another important question of federal law which has not been settled by this Court, to wit, that petitioner in his application for an immigration visa, in response to a question as to whether or not he had ever "been convicted" must admit a conviction upon his plea of *nolo contendere*. [R. p. 80.] This Court in its decision in *Hudson v. United States*, 272 U. S. 451, 455, 47 S. Ct. 147, 71 L. Ed. 347 (1926), stated that the unquestioned rule of law is that the implied confession, *i.e.*, the plea of *nolo contendere*, "does not estop the defendant to plead and prove his innocence in a civil action." Petitioner contends that if he may deny in a civil proceeding, *i.e.*, in an application for an immigration visa, that he committed the crime of wilful attempt to defeat or evade income tax, he should not be required to admit that he was convicted of such crime in such application, for the admission of conviction of such crime would nullify his right to deny his guilt of such crime. This is an important question of federal law in that it reaches the essential nature of a conviction upon a plea of *nolo contendere* and affects all persons who have been convicted upon such plea.

3. The decision of the Court below involves a direct conflict with decisions of the Court of Appeals for the Second and Seventh Circuits on two points:

(a) The decision of the Court of Appeals below involves a direct conflict with decisions of the Court of Appeals for the Second and Seventh Circuits, to wit, the decisions in *United States ex rel. Robinson v. Day* (C. C. A. 2, 1931), 51 F. 2d 1022; *United States ex rel. Giglio v. Neelly* (C. C. A. 7, 1954), 208 F. 2d 337; *United States ex rel. Guarino v. Uhl* (C. C. A. 2, 1939), 107 F. 2d 399; *United States ex rel. Zaffarano v. Corsi* (C. C. A. 2,

1933), 63 F. 2d 757, on the question of whether or not the deporting officials and the Courts reviewing the acts of such officials can consider the averments in the indictment to which petitioner pleaded *nolo contendere* and which are not an essential part of the crime, to wit, the averments that petitioner made false and fraudulent income tax returns, in determining whether petitioner was convicted of a crime involving moral turpitude. The Court of Appeals for the Second and Seventh Circuits in the cases just mentioned have held that when a crime does not necessarily involve moral turpitude the alien cannot be deported because in the particular instance his conduct was immoral and that neither the Immigration officials nor the Court reviewing their decision may go outside the record of conviction, to wit, the charge, plea, verdict and sentence, to determine whether in the particular instance the alien's conduct was immoral; while the Court below herein has held that non-essential allegations in the indictment which constitute in fact the means or conduct of petitioner in committing the income tax violation can be considered in determining that petitioner was convicted of a crime involving moral turpitude. The Second Circuit in *United States ex rel. Guarino v. Uhl, supra,* has held that matters of surplusage in the indictment cannot be considered to determine whether or not the alien was convicted of a crime involving moral turpitude. The Second Circuit in the case just cited reversed the District Court (see *United States ex rel. Guarino v. Uhl* (D. C. N. Y.), 27 Fed. Supp. 135), the District Court having considered surplusage in the indictment to determine that the alien in that case had been convicted of a crime involving moral turpitude. The particular means by which a wilful attempt to defeat or evade income tax has been

committed need not be alleged in the indictment, *Capone v. United States* (C. C. A. 7, 1932), 56 F. 2d 927, 931.

The Court below concluded [R. pp. 77-78], that *United States ex rel. Zaffarano v. Corsi, supra,* is authority to support the conclusion that the averments of fraud in an indictment charging wilful attempt to defeat or evade income tax can be considered by the Court in determining that petitioner was convicted of a crime involving moral turpitude. The Second Circuit in the case just mentioned was considering a judgment of conviction which referred only to a conviction of second degree assault under the New York law; the particular New York statute, as stated at page 758 of the opinion in *United States ex rel. Zaffarano v. Corsi, supra,* defines assault of second degree in five subdivisions, some of which do and some of which do not involve moral turpitude. In other words, the statute involved was a divisible statute and the judgment of conviction in the cited case did not make clear under which subdivision of such New York criminal statute the alien there involved had been convicted. The Second Circuit therefore properly ruled that the indictment could be referred to for the purpose of determining the specific criminal charge of which the alien there involved had been found guilty. The Second Circuit at page 759 of the opinion said that there was therefore no inconsistency between its decision and the decision of the same Court in the case of *United States ex rel. Robinson v. Day, supra,* and at page 759 of the opinion said particularly:

> ". . . *it is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation provided it involves moral turpitude.* Obviously it must be quite immaterial that some other charge not involving moral

turpitude may be called by the same generic name, as for example, assault in the second degree." (Emphasis added.)

The contention of petitioner with respect to the meaning of the decision in *United States ex rel. Zaffarano v. Corsi, supra*, is supported by the decision of the Board of Immigration Appeals in its decision in the Matter of R. decided October 15, 1947 and reported in Volume 2 of Administrative Decisions under the Immigration and Naturalization Laws of the United States, pages 819, 826.

While the Second and Seventh Circuits in the cases cited were concerned in each instance with the deportation of an alien who was charged with two convictions of crimes involving moral turpitude after a sentence in each instance of imprisonment for one year or more, the same considerations must be applied to the meaning of a "crime involving moral turpitude" within the meaning of Section 212(a)(9) of the Immigration and Nationality Act of 1952.

(b) The decision of the Court of Appeals below involves a direct conflict with the decisions of the Second and Seventh Circuits in the cases of *Iorio v. Day* (C. C. A. 2, 1929), 34 F. 2d 920, 921, and *United States ex rel. Leibowitz v. Schlotfeldt* (C. C. A. 7, 1938), 94 F. 2d 263, because of the holding of the Court of Appeals below herein that the failure of petitioner to disclose his conviction of wilful attempt to defeat or evade income tax in his application for an immigration visa was a concealment of a material fact. The Second Circuit in the case of *Iorio v. Day, supra*, held that the concealment by an alien of his prior conviction of a crime not involving moral turpitude in his application for an immigration visa is not a ground for deportation. The Seventh Circuit in its

decision in *United States ex rel. Leibowitz v. Schlotfeldt, supra,* followed the ruling of *Iorio v. Day, supra,* and held that a fact which is not material to the entry of the alien into the United States, and which would not preclude him from entering, need not be disclosed by the alien in his application for an immigration visa.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANK WICKHEM,
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FRANCIS C. WHELAN,
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APPENDIX A.

PERTINENT TEXTS OF STATUTES INVOLVED.

Title 26 U. S. C. Section 145(b) (Int. Rev. Code of 1939), 53 Stat. 62, insofar as pertinent, provides as follows:

> "Any person . . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter . . . . shall . . . . be guilty of a felony. . . ."

Section 212(a)(9) of the Immigration and Nationality Act of 1952, 66 Stat. 182, Title 8 U. S. C. Section 1182(a)(9) insofar as pertinent, provides as follows:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * * * *
>
> "(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense). . . ."

Section 212(a)(19) of the Immigration and Nationality Act of 1952, 66 Stat. 182, Title 8 U. S. C. Section 1182(a)(19) insofar as pertinent, provides as follows:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * * * *
>
> "(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully misrepresenting a material fact; . . ."

Section 241(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 204, Title 8 U. S. C. Section 1251(a)(1), insofar as pertinent, provides as follows:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry; . . ."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, Title 5 U. S. C. Section 1009, so far as pertinent, provides as follows:

* * * * * * * *

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . ."

Section 1114(b) of the Revenue Act of 1926, 44 Stat. at L. 116, chap. 27, U. S. C. Supp. V, Title 26, Section 1266, insofar as pertinent, provides as follows:

"Any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ."

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Tseung Chu, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew, Appellant, vs. Gordon L. Cornell, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service at Los Angeles, California, Appellee. No. 15,344. July 11, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: CHAMBERS and BARNES, Circuit Judges, and WALSH, District Judge.

BARNES, Circuit Judge:

By this action, plaintiff, an alien, sought a judicial declaration in the District Court that an order of deportation issued by the United States Department of Justice, Immigration and Naturalization Service, was invalid. Plaintiff prayed for declaratory relief, and for an injunction restraining the execution of said order of deportation, alleging that appellant had exhausted his administrative remedies. The District Court[1] denied relief to appellant. This is an appeal therefrom.

Section 212(a) of the Immigration and Naturalization Act of 1952, (66 Stat. 182, Title 8 U. S. C. A. §1182(a)) provides in pertinent part:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive

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[1]Jurisdiction was had under the provisions of § 10 of the Administrative Procedure Act, 5 U. S. C. A. §1009.

visas and shall be excluded from admission into the United States:

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) . . . .

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation or seeks to enter the United States by fraud, or by wilfully misrepresenting a material fact."

The order of deportation issued against the defendant rested on two grounds;

(1) that prior to his last entry into the United States he had been convicted of a crime involving moral turpitude, to wit, the crime of wilfully attempting to defeat or evade the income tax; (Internal Revenue Code of 1939, Title 26, U. S. C. A. §145(b));

(2) that he had procured a visa for such last entry by fraud or by wilfully misrepresenting a material fact.[2]

The District Court found that the warrant of arrest was issued, charging appellant with being subject to deportation, on April 20, 1954, on the two grounds here-

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[2]"The order of deportation was made by a Special Inquiry Officer of the Immigration and Naturalization Service [Agreement of Fact, Tr. p. 41], on December 7, 1954, after a warrant of arrest had been issued by the District Director, Immigration and Naturalization Service, on such two grounds [Agreement of Fact, Tr. p. 39] and after a deportation hearing pursuant to such warrant [Tr. pp. 40-41].

An administrative appeal was taken by appellant from the order of deportation and was dismissed by the Board of Immigration Appeals on October 3, 1955 [Agreement of Fact, Tr. p. 41]. On October 27, 1955, a Warrant of Deportation was issued directing that plaintiff be deported from the United States [Agreement of Fact, Tr. p. 41]."

inabove stated. The District Court further found that deportation proceedings were held; that an administrative appeal from the decision of the Special Inquiry Officer was dismissed by the Board of Immigration Appeals; that the Immigration officials who acted had jurisdiction and authority to act; that there was reasonable, substantial, and probative evidence to support the decision of deportability, the order of deportation, and the warrant of deportation; that the deportation proceedings relating to appellant were fair, in accordance with law, and in accordance with appellant's constitutional rights; further, that the violation of Title 26 U. S. C. A. §145(b) constitutes a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Naturalization Act; and, that appellant's failure to disclose his said conviction on his application for an immigration visa was a material fact which appellant was under a duty to disclose.

The Facts.

Appellant first entered the United States at San Francisco, California, on November 9, 1907, as the son of a merchant. He departed June 15, 1912, and was readmitted October 22, 1913, as a treaty merchant. He left this country in 1947, and after six years residence in China, last entered the United States at Honolulu, T. H., on August 11, 1953, as a returning resident alien.

Prior to his last entry, and on March 27, 1944, appellant had been convicted on his plea of *nolo contendere* to violating Title 26 U. S. C. A. §145(b); wilfully seeking to evade and avoid the payment of income tax.

In his application for a visa [Defendant's Exhibit A], appellant failed to disclose the fact of such conviction.

Question No. 32 on the application for visa reads as follows:

"I have never been arrested; convicted; in prison; in an almshouse; treated in an institution, hospital, or other place, for insanity or other mental disease; the beneficiary of a pardon or amnesty, except as hereinafter stated", to which the appellant gave the sworn answer: "None."

Appellant's conviction was based upon a four count indictment, filed February 16, 1944, sumamrized as follows:

Count I charged that appellant for the year 1937 had returned a net income of $1,724.42; that in fact his net income had been $12,440.72; that appellant had

". . . wilfully, knowingly, unlawfully and feloniously" attempted to evade and defeat his tax by making ". . . under his oath . . . a false and fraudulent income tax return for said calendar year. . . . ."

Count II charged that in 1938, in the same manner, and with the same intent and purpose, appellant had made a return of $3,778.21, but had actually received $15,795.77 net income.

Count III charged a 1939 return of $4,766.50, made with the same intent and purpose, and an actual net income of $37,760.65.

Count IV charged a 1940 return of $2,490.35, made with the same intent and purpose, and an actual net income of $14,998.78.

On March 27, 1944, the appellant

". . . was convicted on his plea of nolo contendere of the offenses charged in the Indictment in the above entitled cause, to wit: make (sic) false and fraudulent

income tax returns, as more fully set forth and charged in the counts of the indictment herein;"

and was fined $1,000 on each of the four counts.

On June 24, 1954, an order was entered by the United States District Court, "correcting a clerical error in judgment," on motion of counsel for appellant.[3] The deportation hearing was reopened by the Special Inquiry Officer, pursuant to motion of the alien's counsel, so that this corrected judgment could be introduced in evidence by the alien.

The correction in the judgment, removes the words

"make false and fraudulent income tax returns"

in the original judgment, and substitutes the words

"wilful attempts to evade and defeat income tax."

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[3]This order reads in pertinent part:

". . . it appearing to the satisfaction of the Court that said judgment does contain a clerical error and mistake in that it improperly states: 'The defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, make false and fraudulent income tax returns as more fully set forth and charged in the counts of the indictment herein.'

IT IS THEREFORE ORDERED that said judgment be corrected and modified and changed to read as follows:

'On this 27th day of March, 1944 came the United States Attorney and the defendant Tseung Bowquong Chew, appearing in proper person and with his attorney, Gordon Lawson, Esq.

'Whereas the defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, wilful attempts to evade and defeat income tax, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court . . ." [Exhibit 7.]

The Special Inquiry Officer observed that:

". . . both judgments referring to the offenses charged in the indictment, and showing that the respondent (appellant) had been convicted on his plea of nolo contendere of those offenses."

The Law.

Appellant states, "This appeal involves questions of law. While there are thirteen different specifications of error, appellant's position can be set forth in the discussion of four legal points," which, stated briefly, are these:

1. A violation of Title 26 U. S. C. A. §145(b), Internal Revenue Code of 1939, is not a crime involving moral turpitude.

2. A violation of the same section was not a material fact which appellant was under a duty to disclose on his application for visa

3. A "conviction" upon a plea of nolo contendere is not such a conviction as need be admitted in a civil proceding, and therefore need not be disclosed in an application for an immigration visa.

4. The phrase "crime involving moral turpitude" as used in the Immigration and Naturalization Act does not have a sufficiently definite meaning, "to afford a constitutional standard for deportation."

We shall consider these four points in turn.

IS A VIOLATION OF TITLE 26 U. S. C. A. §145(b), INTERNAL REVENUE CODE OF 1939, A CRIME INVOLVING MORAL TURPITUDE, AS THAT TERM IS USED IN SECTION 212(a)(9) OF THE IMMIGRATION AND NATURALIZATION ACT?

In the leading case of Jordan v. De George, 341 U. S. 223 (1951), 71 S. Ct. 703, 95 L. Ed. 886, there was but one question presented:

". . . whether conspiracy to defraud the United States of taxes on distilled spirits is a 'crime involving moral turpitude' within the meaning of §19(a) of the Immigration Act of 1917. * * * The indictment specifically charged him with possessing whiskey and alcohol 'with intent to sell it in fraud of law and evade the tax thereon.' He was further accused of removing and concealing liquor 'with intent to defraud the United States of the tax thereon.'"

Defendant pleaded guilty, was sentenced, served his time and was again indicted.

"He was charged was conspiring to 'unlawfully, knowingly and wilfully defraud the United States of tax on distilled spirits.'"

He was tried, found guilty, and sentenced. Deportation proceedings were then commenced against De George, as an alien who more than once had been sentenced for one year or more.

". . . because of conviction in this country of a[ny] crime involving moral turpitude."

De George sought release by habeas corpus, claiming the crime of which he had been convicted did not involve moral turpitude. The Supreme Court, determining this one issue before it said:

"Without exception, federal and state courts have held that a crime in which a fraud is an ingredient involves moral turpitude. * * * In every deportation case

where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude. This has been true in a variety of cases (citing cases and the facts therein)."

In Chanan Din Khan v. Barber, N. D. Calif., 147 F. Supp. 771 (1957), the same matter was in issue. There the District Court found that a violation of §145(b) is a crime involving moral turpitude.

". . . the Courts have, with apparent unanimity, held that in order for a conviction under 145(b) to stand, the government is required to prove that the evading taxpayer had a specific intent to evade taxation *amounting to an intent to defraud the United States* (emphasis by the Court). Fraud is so inextricably woven into the term wilfully, *as it is employed in §145(b)*, that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached." (emphasis added)

Cf.; Wardlaw v. United States, 5 Cir., 203 F. 2d 884; Block v. United States, 9 Cir., 221 F. 2d 786, 788.

We are not unmindful of the myriad decisions sponsoring various concepts of moral turpitude. They offer no well settled criteria.[4]

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[4]E.g. U. S. ex rel. McKenzie v. Savoretti, 5 Cir., 1952, 200 F. 546 (forgery, uttering and larceny); Bermann v. Reimer, 2 Cir., 1941, 123 F. 2d 331 (obtaining goods by false representations); U. S. ex rel. Berlandi v. Reimer, 2 Cir., 1940, 113 F. 2d 429 (evasion of revenue taxes); Maita v. Haff, 9 Cir., 1940, 116 F. 2d 337 (violation of prohibition laws); Mercer v. Lence, 10 Cir., 1938, 96 F. 2d 122, certiorari denied 1938, 305 U. S. 611, 59 S. Ct 69, 83 L. Ed. 388 (conspiracy to defraud by deceit and falsehood); Guarneri v. Kessler, 5 Cir., 1938, 98 F. 2d 580, certiorari denied 1938, 305 U. S. 648, 59 S. Ct. 229, 83 L. Ed. 419 (conspiracy to smuggle and conceal imported alcohol with

It is true, as appellant contends, that the words "involving moral turpitude" refer (—at least by Bouvier's dictionary definition—) to conduct "which is inherently base, vile, or depraved, contrary to accepted rules of morality, whether it is or is not punishable as a crime," while the interpretation placed by the courts on the word "wilful" as used in §145(b) (and not as the word is interpreted in certain other statutes) requires the trier of fact only to find evil motive or bad purpose, plus a specific intent to defraud the government.[5] This intent to defraud supplies the necessary element sufficient to make a violation of §145(b) a crime involving moral turpitude.

Appellant maintains that the crime of wilful attempt to defeat or evade the income tax in any manner does not *necessarily* involve moral turpitude, citing this Court's decision in Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844, at 852, cert. den. 348 U. S. 945.

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intent to defraud the revenue); United States ex rel. Popoff v. Reimer, 2 Cir., 1935, 79 F. 2d 513 (fraudulently aiding an alien not entitled to naturalization to apply for citizenship; NG Sui Wing v. U. S., 7 Cir., 1931, 46 F. 2d 755 (rape); Lane ex rel. Cronin v. Tillinghast, 1 Cir., 1930, 38 F. 2d 231 (lewdness); United States ex rel. Allessio v. Day, 2 Cir., 1930, 42 F. 2d 217 (manslaughter and counterfeiting); Tillinghast v. Edmead, 1 Cir., 1929, 31 F. 2d 81 (larceny); United States ex rel. Medich v. Burmaster, 8 Cir., 1928, 24 F. 2d 57 (concealing assets belonging to trustee in bankruptcy); Weedin v. Tayokichi Yamada, 9 Cir., 1925, 4 F. 2d 455 (assault with a deadly weapon).

United States ex rel. Leibowitz v. Schlotfeldt, 7 Cir., 1938, 94 F. 2d 263; United States ex rel. Iorio v. Day, 2 Cir., 1929, 34 F. 2d 920; Bartos v. United States District Court, 8 Cir., 1927, 19 F. 2d 722, Coykendall v. Skrmetta, 5 Cir., 1927, 22 F. 2d 129; United States v. Francioso, 2 Cir., 1947, 164 F. 2d 163.

[5] In Bloch v. United States, supra, in commenting upon an instruction to the jury in a prosecution under §145(b), this Court stated that the District Court had told the jury it must find intent to defraud the government of the income tax due. This Court then said: "This is a correct statement of the law."

By this argument, appellant attempts to broaden language used in that case merely as an example (*i.e.*, "wilful failure to pay federal income tax") to be the exact equivalent of the language of the tax evasion statute ["wilful attempts in any manner to evade or defeat any tax imposed by this Chapter"]. It should be pointed out in this connection, that Twentieth Century-Fox Film Corp. has more to say than appellant notes. It further states:

"With respect to crimes and moral turpitude, there are three possible classifications:

1. Those crimes necessarily involving moral turpitude, for example, frauds;

2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;

3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, wilful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee. See In re Hallinan, 43 Cal. 2d 243; 272 P. 2d 768."

And thereafter, this Court went on to say:

"It would appear that although the crime, per se, is one not historically infamous, or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all the circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction, but on the record of Lardner's actions before the Congressional Committee which had led to his conviction in the District Court in Washington, D.C."

Thus whether the crime to which the appellant plead guilty by plea of nolo contendere falls within categories one or three of the Twentieth Century-Fox decision is not decisive. He was here charged with making in each of four years "a false and fraudulent income tax return." Fraud may not be an essential element of the crime of wilful attempt to defeat or evade the income tax (United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917), but it can be an essential part of that crime. Here fraud was charged as part and parcel of the crime, and to that crime so involving appellant's alleged fraudulent acts, appellant plead nolo.

The "order correcting clerical error in Judgment" eliminating the description of the offense charged as "making false and fraudulent income tax returns" may technically take the *judgment* out of Class One described by Judge Chambers in the Twentieth Century-Fox Film classifications, but it does not take the *crime as charged* out of Class One.

We are familiar with the decision of the California Supreme Court in In re Hallinan, 43 Cal. 2d 243, 272 P. 2d 768 (1954). That case reaffirms the settled principle that,

". . . whatever else it (moral turpitude) may mean, it includes fraud, and that a crime in which an intent to defraud is an essential element is a crime involving moral turpitude,".

and then points out, discussing the adjudicated cases, that

". . . an intent to defraud is not an essential element of section 145(b), and a conviction under that section does not necessarily involve moral turpitude"

(Citing United States v. Scharton, supra) (p. 772), although it may.. (p. 774).[5b] Thereafter, in In re Hallinan, 48 A. C. 50 (Feb. 19, 1957), the California Supreme Court held the facts and circumstances surrounding the commission of the offense of which petitioner was convicted did involve moral turpitude. The Court succinctly stated:

"Criminal acts involving intentional dishonesty for the purpose of personal gain are acts involving moral turpitude. An examination of the record . . . discloses ample evidence that petitioner intentionally and for the purpose of personal gain filed false income tax returns for the years 1947 to 1950, inclusive."

It has been held in certain cases that the crime of which an alien was convicted twice (in order to deport him, 8 U. S. C. A. §1251(a)(4)) "must *necessarily* involve moral turpitude to warrant deportation." (emphasis added) In these cases it is said that:

". . . when by definition the crime 'does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral'."

United States ex rel. Robinson v. Day, 2 Cir., 51 F. 2d 1022 (1931), involving forgery, and suspended sentence;

United States ex rel. Griffo v. McCandless, D. C. Cir., 28 F. 2d 287, 288 (involving aggravated assault and battery);

[5b]See also: Kentucky State Bar Ass'n v. Brown, (Ky. Ct. App., decided 5/31/57; 25 Law Week 2575.); Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 16 So. 2, 843; Louisiana State Bar Ass'n v. Connelly, 201 La. 341, 9 So. 2, 582 206 La. 883, 20 So. 2, 168.

United States v. Carrollo, D. C. Cir., 30 F. Supp. 3, 7 (1939), (involving income tax violation §145(b));

United States ex rel. Giglio v. Neelly, 7 Cir., 208 F. 2d 337, 340-2 (1953), (involving counterfeiting pennies).

But, United States ex rel. Zaffarano v. Corsi, 2 Cir., 63 F. 2d 757, 759, in the Per Curiam opinion on Petition for Rehearing, explains that the judgment alone does not control; the indictment is properly considered in coming to a determination whether moral turpitude is involved where there has been a conviction of any crime (there, assault). In discussing the general language of Robinson v. Day, the Court said:

"*This language means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction* to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean *the charge (indictment); plea, verdict, and sentence.* The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. So construed, there is no inconsistency between that opinion and this; and such is plainly the correct construction, because *it is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation,* provided it involves moral turpitude. * * *" (emphasis added)

See also, United States v. Carrollo, supra, p. 7, Point 12, 2nd ¶.

In re Hallinan, supra, also quotes United States v. Carrollo, supra, for the principle that whether or not

a crime involves moral turpitude does not depend upon unnecessary adjectives added to the indictment by a "zealous and over careful prosecutor." We agree with that principle, but we do not concede, in view of the rule laid down by us in the Bloch case, and the language of the Supreme Court in the De George case, that the language added to the indictment to which appellant here pleaded can be classified as "unnecessary."

We follow the rule laid down in the De George case supra, and Bloch v. United States, supra, (1955), that an intent to defraud the government is a prerequisite to conviction under section 145(b)[6] and hence, a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude.[7]

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[6]This same rule was followed in this Circuit by a recent District Court case (Chanan Din Khan v. Barber, 147 F. Supp. 771; at page 775) which relied (in Note 5) on:

"United States v. Rosenblum, 7 Cir., 176 F. 2d 321, certiorari denied 338 U. S. 893, 70 S. Ct. 239, 94 L. Ed. 548; United States v. Raub, 7 Cir., 177 F. 2d 321; Norwitt v. United States, supra, [main text]; Wardlaw v. United States, 203 F. 2d 884; Bloch v. United States, 9 Cir., 221 F. 2d 786; Legatos v. United States, 9 Cir., 222 F. 2d 678; and United States v. Clark, D. C., 123 F. Supp. 608. Cf. Berra v. United States, 351 U. S. 131, at page 134, 76 S. Ct. 685, at page 687, 100 L. Ed. 1013.

Plaintiff contends that the case of United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, is determinative of the issue of whether fraud is an element in §145(b). A close examination of that case, however, discloses that the Supreme Court decided only that in order for the government to avail itself of the 6-year statute of limitations for fraud actions, the statute under which it was prosecuting must be specifically couched in terms of fraud. Moreover, the recent case of Berra v. United States, supra, sheds considerable doubt on plaintiff's interpretation of the Scharton case."

[7]Cf. also Berardi v. Ritter, 125 Atl. 2d 877, 881; Maita v. Haff, 9 Cir., 116 F. 2d 337, 339 (1940), (distilling of alcohol with intent to defraud the United States of the tax involves moral turpitude).

IS A VIOLATION OF TITLE 18 U. S. C. A. §145(b) (INTERNAL REVENUE CODE OF 1939) A MATERIAL FACT APPELLANT WAS UNDER A DUTY TO DISCLOSE IN HIS APPLICATION FOR A VISA?

Once we have concluded that the conviction of §145(b) was a conviction involving moral turpitude, then appellant was under a duty to disclose it as a material fact, for a conviction of a crime involving moral turpitude is without question a material fact.. The cases cited by appellant,

United States ex rel. Iorio v. Day, 2 Cir., 34 F. 2d 920 (1929), (possession of Whiskey);

Matter of B., 3—Adm. Dec. 278;

Matter of M., (Interim Dec. 791, May 23, 1956).

All relate to failure to disclose matters which could not have been the basis for deportation.

Cf.: Rousseau v. Weedin, 9 Cir., 284 Fed. 565, at 566;

Berman v. Reimer, 2 Cir., 123 F. 2d 331 (1941);

Masaichi Ono v. Carr, 9 Cir., 56 F. 2d 772 (1932);

U. S. ex rel. Alvarez y Flores v. Savoretti, 5 Cir., 205 F. 2d 544 (1953).

And see discussion of Iorio v. Day, supra, by the same Court in a subsequent decision, Berlandi v. Reimer, 2 Cir., 113 F. 2d 429, 430 (1940) (Judge L. Hand dissents).

We need not here come to the question of whether or not *any* conviction, whether of a crime involving moral turpitude or not, or whether of a felony or a misdemeanor, is a material fact of which the government is entitled to be advised.

IS THE RULE MADE ANY DIFFERENT WHERE THE CONVICTION IS BY PLEA OF NOLO CONTENDERE?

We conclude that it is not.

Appellant relies on Hudson v. United States, 272 U. S. 451, 455, 47 S. Ct. 147, 71 L. Ed. 347, and dictum in United States ex rel. Bruno v. Reimer, C. C. A., 2 Cir., 98 F. 2d 92 (1938).

The Second Circuit court in the Bruno case, in rejecting the alien's plea that a nolo contendere plea is not a conviction, had this to say by per curiam opinion (p. 92-93):

"* * * It is true that the plea is not treated as a confession, which can be used against the accused elsewhere; but it gives the judge as complete power to sentence as a plea of guilty. Hudson v. United States, 272 U. S. 451. And it is as conclusive of guilt for all purposes of prosecution under the indictment, (citations). Moreover, a sentence upon it is a conviction within the terms of a local statute applying to second offenders. (citation) The relator might succeed, therefore, if deportation depended upon his admission of *the commission of a crime*, as it may in the case of crimes committed before entry; but *since it depends upon conviction and sentence, conviction and sentence are the only relevant facts*, and the accused may be deported whenever these have been procured by any lawful procedure, as in this case they were." (emphasis added)

The Hudson case, in which Chief Justice Stone takes the opportunity to prove his extraordinary knowledge of the English Common Law, does not stand alone for the rule, as appellant maintains, that a plea of nolo contendere "does not create an estoppel to deny conviction." Mr. Justice Stone points out that in Hawkins, Pleas to the

Crown, 8th Ed., Book 2, Chap. 31, 466, the author treats rather inadequately of Confessions; Express or Implied; and that under early English practice "an implied confession, as contrasted to the express confession, does not estop the defendant to plead and prove his innocence in a civil action." Thus far the Chief Justice has been describing the contents of the early English text. He then states:

"But even if we regard the implied confession as a petition (for the mercy of the King) which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into a formal plea of nolo contendere. Like the implied confession; this plea does not create an estoppel, but like the plea of guilty, *it is an admission of guilt for the purposes of the case.*" (emphasis and portion in parenthesis added)

Cf. also, United States v. Norris, 281 U. S. 619, 622 (1930).

Appellant was not asked on his application for visa if he was or was not guilty of any crime; nor if he had or had not plead guilty to a crime. He was asked if he had ever been convicted: It was to this that his answer was "none." It was this that was false.

While all jurisdictions do not agree, it is the majority rule that a plea of nolo contendere is an implied confession of guilt, and has the same effect as a plea of guilty, so far as the proceedings on an indictment are concerned. Hence a defendant who has been sentenced on such a plea is to be deemed convicted of the offense for which he was indicted.

Commonwealth v. Ingersoll, 14 N. E. 449, 145 Mass. 381.

The plea of nolo contendere admits matters alleged in the information when the plea is entered.

Ellsworth v. State, 46 N. W. 2, 746, 748, 258 Wis. 636.

Except under extraordinary circumstances, the plea of nolo contendere leaves open for review but one thing—the sufficiency of an indictment.

Brotherhood of Carpenters v. United States, 330 U. S. 395, 412.

The plea of nolo contendere when accepted by the court, becomes for all practical purposes, "the full equivalent of a plea of guilty,"

Farrington v. King, 128 F. 2d 785, 786 (8th C. C. A.)

but distinguishable from that plea "in that it cannot be used against the defendant as an admission *in any civil suit for the same act.*" (emphasis added)

Tucker v United States, 7 Cir., 196 Fed. Rep. 260, (1912).

If plaintiff were sued civilly for his income tax deficiency, he could with propriety have objected to the introduction of the plea of nolo contendere as any admission on his part that he did defraud the government. The plea cannot be used to prove he did defraud the government. It can be used to prove he did not answer the question truthfully, when, asked if he had ever been convicted, he replied that he had not. The question went to, and his answer included, conviction in *any case*, includ-

ing the one to which he had entered a nolo plea, "the equivalent of a guilty plea in that case, for all practical purposes."

Cf.: Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 376 (1939)

and cases cited and discussed.

United States v. Jones, 119 F. Supp. 288, 290 (1954).

DOES THE PHRASE "CRIME INVOLVING MORAL TURPITUDE" HAVE A SUFFICIENTLY DEFINITE MEANING TO AFFORD A CONSTITUTIONAL STANDARD FOR DEPORTATION?

We feel this point is best answered by the consideration of the precise point in Jordan v. De George, supra. There the Court said:

"But it has been suggested that the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and that the statute before us is therefore unconstitutional for vagueness. Under this view, no crime, however grave, could be regarded as falling within the meaning of the term 'moral turpitude.' The question of vagueness was not raised by the parties nor argued before this Court.

It is significant that the phrase has been part of the immigration laws for more than sixty years. As discussed above, the phrase 'crime involving moral turpitude' has also been used for many years as a criterion is a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the

phrase is so meaningless as to be a deprivation of due process.

Furthermore, this Court has itself construed the phrase 'crime involving moral turpitude.' In United States ex rel. Volpe v. Smith, Director of Immigration, 289 U. S. 422 (1933), the Court interpreted the same section of the Immigration Statute now before us. There, an alien had been convicted of counterfeiting government obligations with intent to defraud, and one question of the case was whether the crime of counterfeiting involved moral turpitude. This question was raised by the parties and discussed in the briefs. The Court treated the question without hesitation, stating that the crime of counterfeiting obligations of the United States was *'plainly a crime involving moral turpitude.'* 289 U. S. at 423. (emphasis supplied.)

The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States, 341 U. S. 97, decided April 23, 1951; Screws v. United States, 325 U. S. 91, 103-104 (1945). This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. Lanzetta v. New Jersey, 306 U. S. 451 (1939); United States v. Cohen Grocery Co., 255 U. S. 81 (1921). It should be emphasized that this statute does not declare certain conduct to be criminal. Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes.

Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view

of the grave nature of deportation. The Court has stated 'deportation is a drastic measure and at times the equivalent of banishment or exile . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.' Fong Haw Tan v. Phelan, supra, at 10. We shall, therefore, test this statute under the established criteria of the 'void for vagueness' doctrine.

We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U. S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U. S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Connally v. General Construction Co., 269 U. S. 385 (1926).

We conclude that this test has been satisfied here. Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."

Jordan v. De George, supra, pp. 229-232.

While it is true that Mr. Justice Jackson, who was joined by Mr. Justice Frankfurter, wrote a strong dissent, we feel bound by the language and reasoning of the majority of the Supreme Court.

The other matters raised by appellant go to the insufficiency of the evidence to support certain findings of fact and alleged errors in conclusions of law. We are satisfied no error existed in such Findings and Conclusions, once the four issues hereinabove discussed in detail have been determined adversely to appellant.

The judgment is *affirmed*.

(Endorsed:) Opinion. Filed July 11, 1957.

Paul P. O'Brien, Clerk.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

Tseung Chu, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew, Appellant, vs. Gordon L. Cornell, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service at Los Angeles, California, Appellee. No. 15,344. Sept. 12, 1957.

CHAMBERS, Circuit Judge, concurring:

My opinion in Twentieth Century-Fox Film Corp. v. Lardner, 216 F. 2d 844, has created some trouble here. Therein we divided crimes into three categories: 1. Those necessarily involving moral turpitude. 2. Those not involving moral turpitude. 3. Those which might or might not involve moral turpitude. As an example of class (3), we referred to a conviction of willful failure to pay federal income tax. We then cited *In re* Hallinan, 43 Cal. 2d 243, 272 P. 2d 768, where the California Supreme Court held that Hallinan's conviction did not import *per se* moral turpitude.

Without retreating from what was there said, it is evident that a word of explanation is necessary. Lardner's case was a civil diversity case. We were bound to apply California law. At the time of the decision in Lardner, Hallinan's case was new. California had just held that for California purposes—a statute for disbarment involving moral turpitude—Hallinan's conviction was one that might or might not involve moral turpitude. If California should hold any kind of a federal income tax conviction could never involve moral turpitude, we should follow California in construing a California statute or a California contract involved in diversity litigation.

In Tseung Chu's case we have no duty to follow. *In re* Hallinan. Here "moral turpitude" is found in a federal statute. Under such circumstances I can and do say that on the face of the indictment under §145(b) of the Internal Revenue Code of 1939, Tseung Chu was charged with a crime involving moral turpitude for our purposes under 66 Stat. 182(a)(9).* To the charge, he entered a *nolo contendere* plea. I think that this was a material matter he should have disclosed when he signed the immigration form for last entry. He knew he had been in serious trouble—from the amount of money alone which had been involved on his income tax shortage. I would prefer to leave the case there without going into the matter of whether his "nolo contendere" plea was a conviction. My judgment is that the plea must be construed as a conviction, but I do not reach the question.

Generally, by way of post-mortem, I think one should remember this about Lardner's case: there we had not only the indictment and the conviction of Lardner, but we had also in evidence a complete photosound record of Lardner and his associates committing the crimes for which they were convicted. After looking at this audio-visual evidence we thought he had committed a crime involving moral turpitude.

(Endorsed:) Concurring Opinion of Chambers, C. J. Filed Sept. 12, 1957. Paul P. O'Brien, Clerk.

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*See Achilli v. United States, ... U. S. ....., decided May 27, 1957. Forster v. United States, 9 Cir., 237 F. 2d 617.

APPENDIX D.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

May 25, 1954

File No. A2 534 235—Los Angeles

IN RE: CHU, Tseung alias CHEW, Bow Quong aka Tseung Bowquong Chew aka Thomas Bowquong Chew.

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Mr. Francis C. Whelan
Attorney at Law
811 West 7th Street
Los Angeles 17, California

CHARGES:

Warrant: I & N Act—Excludable at time of entry—convicted of crime involving moral turpitude.

I & N Act—Excludable at time of entry—visa procured by fraud or wilfully misrepresenting a material fact.

Lodged: None.

APPLICATION: Terminate proceedings.

DETENTION STATUS: Released under $1,000 bond.

WARRANT OF ARREST SERVED: April 28, 1954.

DISCUSSION: This record relates to a 55 year old married male, a native and citizen of China, who last entered the United States at Honolulu, T. H. on August 11, 1953 and at that time was admitted into the United States as a returning resident alien upon presentation of nonquota immigrant visa No. 243 issued on April 15,

1953 at the American Consulate General at Hong Kong, British Crown Colony, China, under 101(a)(27)(b) of the Immigration and Nationality Act.

The record in this case shows that the respondent first entered the United States at San Francisco, California, being admitted on November 9, 1907 as the son of a merchant, ex SS "Manchuria", October 12, 1907, under the name of CHU, Tseung. He departed from the United States on June 15, 1912 from San Francisco, California on board the vessel "Chiyo Maru" and returned to the United States and was admitted on October 22, 1913, at San Francisco, California, ex SS "Shinyo Maru" as a treaty merchant, under and in accordance with the treaty of trade and commerce between the United States and China.

He next departed from the United States on July 26, 1943, going to Mexico, securing a reentry permit prior to departure, and reentered the United States on October 16, 1943 at Los Angeles, California, being admitted at that time as a returning resident alien. He next departed from the United States from San Francisco, California on March 17, 1947, aboard Pan-American Airways, going to China where he resided variously in Canton City and in Hong Kong until he left to return to the United States, entering on August 11, 1953 as above stated.

The respondent having been previously lawfully admitted into the United States as a treaty merchant prior to July 1, 1924 is considered to have been lawfully admitted into the United States for permanent residence. (8 CFR 4.2(f).)

Going to the first charge in the warrant of arrest, the respondent was indicted by the United States Grand Jury

at Los Angeles, California on four counts of income tax evasion, in violation of Title 26, United States Code, Section 145(b), the indictment being filed on February 16, 1944.

Count one of that indictment charges in pertinent part that this respondent, "did wilfully, knowingly, unlawfully, and feloniously attempt to evade and defeat a large part of said tax, * * *, upon his said net income for the said calendar year, 1937, and as means of so wilfully, knowingly, unlawfully, and feloniously attempting to evade and defeat said tax, did on, to-wit: March 15, 1938, at Los Angeles in the State and Judicial District aforesaid, make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return for the said calendar year, * * *." This was for making a false and fraudulent income tax return for his income for the year 1937.

Count Two of the Indictment charges in pertinent part that this respondent, "did on, to-wit: March 15, 1939, at Los Angeles, in the State and Judicial District aforesaid, make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return for said calendar year * * *." This was for making a false and fraudulent income tax return for his income for the year 1938.

Count three of the indictment reads substantially the same, charging an evasion or attempt to evade the income tax for the year 1939 in that the respondent, "did on, to-wit: March 15, 1940 at Los Angeles, in the State and Judicial District aforesaid, make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return for said calendar year, * * *."

Count four of the indictment is substantially the same charging an attempt to evade and defeat the income tax for the year 1940, in that the respondent, "did on, to-wit: March 15, 1941, at Los Angeles, in the State and Judicial District aforesaid, make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return for said calendar year * * *."

For the purpose of this proceeding Section 145(b) of Title 26 of the United States Code (Internal Revenue Code), under which the respondent was indicted on February 16, 1944, under the heading—Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax —reads as follows:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

On March 27, 1944 in the United States District Court for the Southern District of California at Los Angeles, California, the respondent entered a plea of nolo contendere to the charges contained in the indictment. The judgment in the case, entered on March 27, 1944, shows in respect to this respondent that:

"The defendant having been convicted on his plea of nollo contendere of the offenses charged in the indict-

ment in the above entitled cause, to-wit: Make False and Fraudulent Income Tax Returns, as more fully set forth and charged in the counts of the Indictment herein, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby ordered to pay unto the United States of America a fine in the sum of One thousand dollars ($1,000.00) on each of the four counts of the indictment herein, total fine Four thousand dollars ($4,000.00), to be paid as follows: Two thousand dollars on or before noon April 15, 1944, and Two thousand dollars ($2,000.00) on or before noon May 15, 1944, and to stand committed in the event of failure to pay said fines."

This judgment was issued over the signature of the court in this case.

In the motion to terminate the proceedings it was urged at the hearing that the evasion of income taxes, in effect, does not involve moral turpitude, citing U. S. vs. Corrollo, 30 Fed. Supp. 3 and further urging that inasmuch as fraud was not required to be proven to secure a conviction under Section 145(b) of the Internal Revenue Code, Supra, such conviction in this case was not a conviction involving moral turpitude, citing Jordan vs. de George, 341 U. S. 233, and U. S. v. Scharton, 285 U. S. 518 and other cases cited.

However a reading of the statute under which the respondent was indicted, found guilty, and convicted and sentenced, shows that that statute in pertinent part reads:

> "* * * Any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony * * *."

While it is not necessary to prove fraud as an element to secure conviction, or prove violations of law, under Section 145(b) of the Internal Revenue Code, that statute recognizes the elements of fraud may and can be an ingredient in the attempt to evade or defeat any tax imposed under the Internal Revenue Code.

In recognizing the Supreme Court Decision in Jordan vs. de George (341 U. S. 223, 95 Lawyers Edition 886) the Board of Immigration Appeals stated that where fraud or forgery is involved, it is clear that a finding of moral turpitude is required. (I. D. 505.)

In the indictment entered in the case of the respondent on February 16, 1944, it was charged in each of the four counts that in his attempt to evade and defeat a tax imposed under the Internal Revenue Code the respondent made under his oath a false and fraudulent income tax return on four different occasions. The element of fraud is specifically charged in the indictment and in the judgment of the Court the respondent was convicted, and found guilty, of each of the four offenses set forth in the indictment that he did make false and fraudulent income tax returns. Here again over the Court's signature we find the element of fraud in connection with the attempt to evade and defeat the income tax imposed by

the Internal Revenue Code and the element of fraud being present in such attempt, a finding must be made that the respondent was convicted of a crime involving moral turpitude, on four counts, on March 27, 1944.

Accordingly, the motion to terminate the proceedings under the first charge in the warrant of arrest must be denied, and the respondent must be found amenable to deportation under the Immigration and Nationality Act on the first charge contained in the warrant of arrest.

Going to the second charge in the warrant of arrest, the record shows that on April 15, 1953, before the American Vice Consul at Hong Kong, China, this respondent subscribed and swore to an application for an immigration visa, and the visa issued him on the same date was based on that application.

Under Item 32 of that application in answer to the statement,—"I have never been: Arrested; convicted; imprisoned; in an almshouse; treated in an institution, hospital, or other place, for insanity or other mental disease; the beneficiary of a pardon or amnesty, except as hereinafter stated:" The answer—"None", is found. Specific cognizance is taken of the first part of item 32 reading—*"I have never been: Arrested; convicted; * * *."*

Respondent at the hearing asserts that he made this application for an immigrant visa but that in giving his answer to item 32 he was under the impression that related as to whether or not he had ever been arrested or convicted in Hong Kong, he having been in China since March 1947. In view of the plain language of the allegation contained in item 32 of the application, and the respondent having been fined $4,000.00 as the result of his conviction on March 27, 1944, his statement made at the hearing is not credible.

In furtherance of the motion to terminate the proceedings and relating to both charges in the warrant and specifically to the second charge in the warrant, there was cited at the hearing the case of United States ex rel. Bruno vs. Reimer, Commissioner of Immigration, 98 Fed. 2d 92, asserting that where a plea of nollo contendere has been entered in answer to an indictment no admission to the crime has been made, and following where no admission has been made it is not necessary to disclose the proceeding or conviction in an application such as an application for an immigrant visa. This contention falls of its own weight by the same case cited by counsel as it is unimportant that the conviction has been obtained on a plea of nollo contendere. Where the charge is "convicted of a crime prior to entry", the judgment of conviction is the important thing, whether it was obtained on a plea of nollo contendere, a plea of guilty, or a plea of not guilty. (I. D. 436.)

In an application for an immigrant visa it is material that an alien disclose whether or not he has been arrested, or convicted of any crime, or imprisoned, as specified by Item 32 of the application, and failure to disclose that information, if the alien has been arrested or convicted or imprisoned, vitiates the visa. In stating, "none", in answer to the allegation made in item 32 of the application for the immigrant visa in this case it must be found that the respondent wilfully misrepresented a material fact, and on this basis the further motion that the proceedings be terminated must be denied and the respondent must be found amenable to deportation under the Immigration and Nationality Act on the second charge contained in the warrant of arrest.

The record in this case relates that the respondent has been married twice, his first marriage terminating in the death of his wife on January 17, 1922 at San Francisco, California, and he being remarried in Mexico on July 29, 1943. His present wife was admitted into the United States as the wife of a merchant, on October 16, 1943 and departed for China with the respondent on March 17, 1947 and is presently residing in Hong Kong, China.

The respondent is the father of five children, three by his first wife and two by his second wife. The three children by his first wife all reside in the United States, one having been born here and two having been born in China. The youngest of these three children was born in 1921 and none of them are dependent upon the respondent. By his second wife the respondent has two children born during 1944 and 1945, both in Los Angeles, California. The eldest of these two children is living in Hong Kong with the present wife of the respondent and the youngest of these two children is living with the respondent in the United States.

The respondent is occupied in dealing in herbs and alleges that he has an income of between $400 and $500 a month.

At the hearing two witnesses were introduced in behalf of the respondent, the first a Mr. S. K. Lau, who claims acquaintance with the respondent for twenty-five years last past and states that the respondent's reputation for truth and honesty among the Chinese people in the community is good. The second witness, a Mr. Albert Lau, no relation to the first witness, states that he first met the respondent about fourteen years ago when the respondent made a temporary trip to San Francisco, that he

saw the respondent once or twice a month in Hong Kong between November 1947 and June 1948, when this witness was on a temporary visit to China, and that he has seen the respondent since the respondent returned to the United States about once a month during the past year and that the respondent's reputation for truth and honesty is good among the people of the Chinese community at Los Angeles, California.

The respondent has not specified any country for deportation in the event that he is ordered deported.

FINDINGS OF FACT:

(1) The respondent is an alien, a native and citizen of China;

(2) The respondent last entered the United States on August 11, 1953 at Honolulu, T. H.;

(3) The respondent at the time of admission presented nonquota immigrant visa No. 243 issued him on April 15, 1953 at Hong Kong, China;

(4) The immigrant visa issued the respondent at Hong Kong, China on April 15, 1953 was based on his application executed at the American Consulate General at Hong Kong, China on April 15, 1953;

(5) The respondent was convicted on March 27, 1944 in the United States District Court of Los Angeles, California on four counts of violation of Title 26 U. S. Code, Section 145(b), Income Tax Evasion, on the ground that he made False and Fraudulent Income Tax Returns;

(6) In his application for an immigrant visa, executed April 15, 1953, the respondent wilfully failed to disclose his conviction on March 27, 1944, as required by the application for the visa.

CONCLUSIONS OF LAW:

(1) Under Section 241(a)(1) of the Immigration and Nationality Act, the respondent is subject to deportation on the ground that, at time of entry, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit: aliens who have been convicted of a crime involving moral turpitude under Section 212(a)(9) of the Act, to-wit: Making False and Fraudulent Income Tax Returns, in violation of Title 26 United States Code, Section 145(b);

(2) Under Section 241(a)(1) of the Immigration and Nationality Act, the respondent is subject to deportation on the ground that, at time of entry, he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to-wit: aliens who have procured a visa or other documentation by fraud or by wilfully misrepresenting a material fact, under Section 212(a)(19) of the Act.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

IT IS FURTHER ORDERED that the motion to terminate the proceeding be and the same is hereby denied.

JOHN B. BARTOS

John B. Bartos

Special Inquiry Officer

JBB/emd

APPENDIX E.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File No. A2 534 235—Los Angeles.

Dec. 7, 1954

In Re: CHU, TSEUNG a/k/a CHEW, BOW QUONG a/k/a TSEUNG BOWQUONG CHEW a/k/a THOMAS BOWQUONG CHEW.

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Mr. Francis C. Whelan
Attorney at Law
811 West 7th Street
Los Angeles 17, California

CHARGES:

Warrant: I & N Act—Excludable at the time of entry—convicted of crime involving moral turpitude.

I & N Act—Excludable at time of entry—visa procured by fraud or wilfully misrepresenting a material fact.

Lodged: None.

APPLICATION: Terminate proceedings.

DETENTION STATUS: Released under $1000.00 bond.

WARRANT OF ARREST SERVED: April 28, 1954.

DISCUSSION: The respondent is a 65 year old married male, a native and citizen of China, who last entered the United States at Honolulu, T. H. on August 11, 1953 and at that time was admitted into the United States as a returning resident alien.

This respondent was accorded a full hearing under the warrant of arrest at Los Angeles, California on May 11, 1954. On the basis of that hearing a decision was entered by the Special Inquiry Officer on May 25, 1954 ordering the respondent deported from the United States, and in that decision the factors of the case were thoroughly discussed and that discussion is adopted as a part of this decision.

The decision of May 25, 1954 was appropriately served and on June 7, 1954 an appeal was received at the Los Angeles office, dated June 4, 1954, from the above cited decision. However, prior to the forwarding of the record on appeal, Counsel for the respondent on June 25, 1954 submitted a motion to reopen the proceedings for the purpose of introducing into the record new evidence pertinent to the proceedings. Under date of June 30, 1954 the motion was granted and the hearing ordered reopened, and on November 16, 1954 the reopened hearing was conducted.

At the reopened hearing on November 16, 1954 there was introduced on behalf of the respondent an order of the United States District Court at Los Angeles, California, number 16635-Criminal, correcting a "clerical error" in the judgment entered in the case of this respondent by the United States District Court at Los Angeles, California on March 27, 1944.

In the judgment entered in the case on March 27, 1944 it was stated:

> "The defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, make false and fraudulent income tax returns as more fully set forth and charged in the counts of the indictment herein * * *"

On June 21, 1954 this part of the judgment was corrected to read:

> "Whereas the defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, *wilful* attempts to evade and defeat income tax, * * *"

The correction in the judgment removes the words—"make false and fraudulent income tax returns",—as contained in the original judgment, and substituting the words—"wilful attempts to evade and defeat income tax", both judgments referring to the offenses charged in the indictment, and showing that the respondent had been convicted on his plea of nolo contendere of those offenses.

It is contended that the corrected judgment removes the element of moral turpitude from the offense for which the respondent was convicted, and raises the further contention that a conviction on a plea of nolo contendere is only sufficient for the purposes of the case and may not be used in any other proceeding.

In the matter of W—, Interim Decision number 587, decided by the Board on May 27, 1954, in an income tax evasion conviction case concerning the plea of nolo contendere it was stated:

> "It is noted in passing that respondent was convicted of violating 28 U. S. C. 145(b) on a plea of nolo contendere. Under the Federal Criminal Procedure rule 11, the right to such a plea is clearly discretionary with the court. A plea of nolo contendere is an admission of guilt or in effect a plea of guilty, but only for the purposes of the case. Such a plea

leaves open for review solely the question of the sufficiency of the indictment. Since respondent entered this plea on advice of counsel and with the consent of the court and because this plea is equivalent to an admission of guilt, the plea is definitely final and completely binding upon respondent."

Section 212(a)(9) provides:

"Except as otherwise provided in this Act, the following classes of aliens shall be excluded from admission into the United States: —aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, * * *"

This statute does not prescribe the manner in which the alien must be convicted of the crime, and he is excludable from admission to the United States whether convicted upon his plea of guilty, plea of nolo contendere, or after a plea of not guilty, either by jury or by the court. Therefore, a conviction on a plea of nolo contendere is a conviction on which deportation proceedings may be based, if the crime involves moral turpitude and is pertinent to the proceedings.

Going again to the indictment on which this respondent was convicted on his plea of nolo contendere on March 27, 1944 for violation of Title 26 United States Code, Section 145(b), it is noted that in each count of the indictment the respondent is charged with as means of so *willfully, knowingly*, unlawfully, and feloniously attempting to evade and defeat said tax, did make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return. The order correcting the judgment of March 27, 1944 corrects the judgment to

read that the defendant was convicted of the offenses charged in the indictment, willful attempts to evade and defeat income tax. He was sentenced to pay a fine of $1000.00 on each of the four counts of the indictment for a total fine of $4000.00.

In Interim Decision number 587 it was stated:

> "The moral turpitude question then turns on the crucial statutory word 'willfully.' According to Hargrove vs. United States, 67 F. (2d) 820 (C. C. A. 5, 1933), 'willful' in Section 145(b) means actual knowledge of the existence of the obligation and specific wrongful intent."

The Interim Decision 587 goes on to state:

> "We feel that the courts in passing on Section 145(b), as well as in other cases like Morissette vs. United States, have determined 'willfully' connotes an evil intent, since it differentiates between conscious or deliberate acts and accidental or unintentional infractions. In addition, Section 145(b) imposes a duty on the taxpayer to pay the amount he justly owes and failure to do so, through a willful attempt to evade, constitutes unjust enrichment of the taxpayer and an intent to deprive the Government of this tax money."
>
> "Hence, since moral turpitude inheres in the intent the offense defined in 26 U. S. C. 145(b) is a crime involving moral turpitude."

The corrected judgment in the case making the judgment read that the respondent having been convicted of the offenses charged in the indictment, namely, willful attempts to evade and defeat the income tax, and the offenses in the indictment having been described as mak-

ing false and fraudulent income tax returns willfully, knowingly, unlawfully and feloniously, it must be found that the respondent was convicted of a crime involving moral turpitude on March 27, 1944, and that he is amenable to deportation under the Immigration and Nationality Act on the first charge contained in the warrant of arrest.

In view of the foregoing, no further discussion regarding the second charge in the warrant of arrest is necessary than that contained in the order of May 25, 1954, and accordingly the respondent is found amenable to deportation under the Immigration and Nationality Act on the second charge contained in the warrant of arrest.

Accordingly, the findings of fact and conclusions of law stated in the decision of May 25, 1954 are adopted as part of this decision and the following order will be entered.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

IT IS FURTHER ORDERED that the motion to terminate the proceedings be and the same is hereby denied.

/s/ John B. Bartos
John B. Bartos, Special Inquiry Officer.

JBB/lmh
A2 534 235

APPENDIX F.

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Oct. 3, 1955

File: A-2534235—San Francisco (Los Angeles)

In re: TSEUNG CHU or CHEW, BOW QUONG or TSEUNG BOWQUONG CHEW or THOMAS BOSQUONG CHEW

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:

Francis C. Whelan, Esquire
811 West 7th Street
Los Angeles 17, California
(Heard: February 4, 1955)

CHARGES:

Warrant: I & N Act—Excludable at the time of entry —Convicted of crime involving moral turpitude.

I & N Act—Excludable at time of entry—Visa procured by fraud or wilfully misrepresenting a material fact.

Lodged: None.

APPLICATION: Termination of proceedings.

DETENTION STATUS: Released under $1000 bond.

Respondent is 65 years old, married, male, native and citizen of China, who last entered the United States at Honolulu, T. H., on August 14, 1953, at which time he was admitted into the United States as a returning resident alien. Respondent was ordered deported by a special inquiry officer on the charges stated in the warrant of arrest. He appeals to this Board from that decision.

The special inquiry officer found that respondent had been convicted of a crime involving moral turpitude, in that he was convicted in 1944, on a plea of nolo contendere, for income tax violations extending over the years 1938, 1939, 1940 and 1941. On the basis of the judgment entered in the income tax prosecution the special inquiry officer found on May 25, 1954 that respondent had been convicted of making false and fraudulent income tax returns during those years. Following the finding of the special inquiry officer counsel secured an "Order Correcting Clerical Error in Judgment" from the United States District Court for the Southern District of California, in which it was related that the court, having concluded that the judgment contained a clerical error and mistake, corrects the judgment to be modified and to read that the defendant has been convicted of "wilful attempts to evade and defeat income tax". Counsel argues to this Board that since respondent was not found guilty of making "false and fraudulent income tax returns", that he was not convicted of a crime involving moral turpitude, that "wilful attempts to evade and defeat income tax" does not constitute a crime involving moral turpitude. He believes that the presence of moral turpitude depends on the existence of the element of fraud.

This Board considered the matter of a conviction under 28 U. S. C. 145(b) in Matter of W—, Int. Dec. 587, 5 I & N Dec. 759, (BIA May 27, 1954). In that case we concluded:

> The moral turpitude question then turns on the crucial statutory word "willfully". According to Hargrove v. U. S., 67 F. 2d 820 (C. C. A. 5, 1933), "willfull" in Section 145(b) means actual

> knowledge of the existence of the obligation and specific wrongful intent. . . . We feel that the courts in passing on Section 145(b), as well as in other cases like Morissette v. United States, have determined "willfully" connotes an evil intent, since it differentiates between conscious or deliberate acts and accidental or unintentional infractions. In addition, section 145(b) imposes a duty on the taxpayer to pay the amount he justly owes and failure to do so, through a wilful attempt to evade, constitutes unjust enrichment of the taxpayer and an intent to deprive the Government of this tax money. Spies v. United States, supra[1]; United States v. Skidmore, 123 F. 2d 604 (C. C. A. 7, 1941).
>
> Hence, since moral turpitude inheres in the intent the offense defined in 26 U. S. C. 145(b) is a crime involving moral turpitude.

We have reconsidered the position taken in Matter of W—, and concluded that was an accurate decision, and the offense described in that section of the code necessarily is a crime involving moral turpitude. We are not considering the form of the original judgment, as suggested by counsel; it has not affected the decision in this case in any way. We have not gone behind the record.

The decision in this case turns, as did the decision in Matter of W—, on the construction of the word "wilful". The word "wilful" or "wilfully" is commonly given a "darker shade of meaning" when used in criminal or penal statutes, than it is in statutes describing civil liabilities or responsibilities. U. S. v. Sioux City Stock

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[1] 317 U. S. 492 (1943).

Yards Company, 162 F. 556; U. S. v. Wilson, 116 F. Supp. 911, 912 (D.C. N.M.); State v. Dwyer, 108 Vt. 303, 187 A. 522. This distinction is noticeable, even if not specifically mentioned, throughout the many cases discussing the meaning of these words. The term as used in negligence, price control, domestic relations, etc., laws is given a broader interpretation, and, occasionally, is said not necessarily to include malice or a purpose to violate the law. Oden Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 182; Woods v. Corsey, 89 Cal. App. 2nd 105, 200 Pac. 2d 208; Rightmeyer v. Von Lengerke Buick Co., 116 F. Supp. 470 (D.C. N.J.). However, "wilful" as used in statutes establishing a criminal liability or penalty is held not to mean accidental or involuntary, but to mean intentional and voluntary. Ellis v. U. S., 206 U. S. 246, 257, 51 L. Ed. 1047, 1053, 27 S. Ct. 600; Screws v. U. S., 325 U. S. 98, 89 L. Ed. 1495; and U. S. v. Murdock, 290 U. S. 389, 394, 78 L. Ed. 381, 384, 54 S. Ct 223, (1933), and cases cited. These cases declare that in a criminal statute the word "wilful" generally means an act done with a bad purpose, and an evil motive becomes a constituent element of the crime. This distinction between the broader, civil interpretation and the narrower criminal interpretation of "wilful" and "wilfully" appears throughout the many case defining that term. See also Vol. 45 Words and Phrases, (perm. Ed.), pp. 136-339, specifically 187 and 191; Supp., pp. 40-95.

Spies v. U. S., 317 U. S. 492, 87 L. Ed 418 (1943) discussed the difference between 26 U. S. C. A. 145(a) and 145(b). Section 145(a) makes the offense described therein a misdemeanor, and 145(b) makes wilful attempt in any manner to evade or defeat any tax on in-

come a felony. The court describes the graduated system of penalties and punishments for errors, failures to pay and fraud, and then states (p. 497):

> The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. Section 145(b).

The court believed that the difference between a misdemeanor and felony as provided in these subsections lay in the term "attempt", pointing out:

> We think that in employing the terminology of attempt to embrace *the gravest of offenses against the revenues*, Congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors. (emphasis ours) Wilful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a wilful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Having been convicted under 145(b), it must be said that Mr. Chew was convicted of a wilful and positive attempt. He was found guilty of the "gravest of offenses against the revenues." In the light of the Spies case the combination of the terms "wilful" and "attempt" prevents us from holding, if we would, that the offense described in 26 U. S. C. 145(b) is other than a crime involving moral turpitude. Under the decisions of the Supreme Court cited above it cannot be said that Section 145(b) includes both crimes which do and crimes which do not involve moral turpitude. Convictions for lesser crimes must necessarily fall under other provisions of the

revenue act. 145(b) describes a wilful and positive attempt to evade the tax in a manner which lifts the offense to the degree of felony. This respondent was convicted *after* the decision in the Spies case, so if the Spies case laid down a new rule, as argued by counsel, it must be held that respondent's conviction in 1944, a year after the decision in the Spies case, was a conviction within the rule of that case.

It is our conclusion that respondent was indicted for and found guilty on his plea of nolo contendere of a crime involving moral turpitude, in that the presence of the term "wilful" in the statute and the judgment necessarily describes an offense which was committed intentionally and voluntarily. It is in the intent that the moral turpitude inheres.

We find that respondent was excludable at time of entry as a person who was convicted of a crime involving moral turpitude prior to entry. Therefore, it would do no good to stretch our credulity to accept respondent's plea that he did not know that it was necessary when he applied for a visa in Hong Kong to disclose his conviction for crime in the United States. He pleads that when he was asked whether or not he had been convicted of a crime, he believed the question referred only to crimes committed since he had been in Hong Kong. He claims he thought it was not necessary to disclose any offense or conviction in the United States and that is why he did not disclose the conviction for income tax violations. Respondent has lived in the United States most of his life, having been first admitted here in 1907 as the son of a merchant at the age of 18 and having lived here ever since with the exception of seven and a half to eight years he has spent outside of the United States on three

different occasions. The hearings were conducted in English, and apparently his comprehension of that language is adequate. It is a common excuse in connection with visa frauds and misrepresentations that the alien did not understand, or that the employee at the Consulate did not read the question to him. If we were to believe this defense in the case of respondent, a man of education, acquainted with our language and culture, we should certainly have to accept the excuse in the case of most applicants for admission to the United States, few of whom have had his advantages. We must find respondent excludable on the second charge stated in the warrant of arrest.

Counsel pleads that an alien who has been convicted of a crime upon a plea of nolo contendere is not estopped to deny, and need not admit, the conviction in his application for an immigration visa. A conviction on a plea of nolo contendere is as much a conviction as a conviction on any other plea. A failure to admit such a conviction is as much a wilful misrepresentation as if respondent had been tried on a plea of not guilty and convicted by a jury. We discussed a similar contention in Matter of C—, 5 I & N 198 (BIA April 10, 1953), wherein there had been a plea of nolo, but no conviction or sentence under a special statute of the State of Rhode Island providing for such a procedure. We declared,

> Unquestionably, if there had been a conviction it would be unimportant that the conviction had been obtained on a plea of nolo contendere. Where the charge is "conviction of a crime prior to entry" the *judgment of conviction is the important thing*, whether it was obtained on a plea of nolo contendere,

plea of guilty or plea of not guilty. But it takes the judgment of the court on a plea or verdict to constitute a conviction.

Counsel cites U. S. ex rel. Bruno v. Reimer, Commissioner of Immigration, 98 F. 2d 92 (C. A. 2, 1938), wherein the court said that deportation depends upon conviction and sentence, that *conviction and sentence are the only relevant facts*, and "the accused may be deported whenever these have been procured by any lawful procedure, as in this case they were". In the instant case it is unimportant that Mr. Chew was convicted on a plea of nolo. The important thing is that he was convicted and sentenced, and we have no authority to look behind the conviction and the sentence, to the evidence or the plea.

Respondent is deportable on the charges stated in the warrant of arrest. The appeal must be dismissed.

ORDER: It is ordered that the appeal be and it hereby is dismissed.

Chairman

APPENDIX G.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Tseung Chu, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew, Appellant, vs. Gordon L. Cornell, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service at Los Angeles, California, Appellee. No. 15344.

JUDGMENT

Appeal from the United States District Court for the Southern District Court of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: July 11, 1957.

PAUL P. O'BRIEN, Clerk.